SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-11-036133-094

DATE: **DECEMBER 23, 2010**

PRESENT: THE HONOURABLE MR. JUSTICE CLÉMENT GASCON, J.S.C.

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

ABITIBIBOWATER INC.
And
ABITIBI-CONSOLIDATED INC.
And
BOWATER CANADIAN HOLDINGS INC.
And
The other Petitioners listed on Schedules "A", "B" and "C"
Debtors

And
ERNST & YOUNG INC.
Monitor

JUDGMENT ON MOTION FOR AN ORDER CONCERNING THE STATUS OF THE POST-FILING SUPPLY CLAIM OF NPOWER COGEN (#773 and 775)

INTRODUCTION

[1] On September 23, 2010, the Court issued a Sanction Order pursuant to which it approved the Plan of Reorganization and Compromise (**"*CCAA* Plan"**[1]) filed by the

[1] This Plan of Reorganisation and Compromise (as modified, amended or supplemented by *CCAA* Plan Supplements 3.2, 6.1(a)(i) (as amended on September 13, 2010) and 6.1(a)(ii) dated September 1, 2010, *CCAA* Plan Supplements 6.8(a), 6.8(b) (as amended on September 13, 2010), 6.8(d), 6.9(1) and 6.9(2) dated September 3, 2010, and the First Plan Amendment dated September 10, 2010, and as may be further modified, amended, or supplemented in accordance with the terms of such Plan of

JG1793

Abitibi Petitioners (listed in Schedule A), the Bowater Petitioners (listed in Schedule B) and the Partnerships (listed in Schedule C) (collectively, "**Abitibi**") in the *CCAA*[2] restructuring process they had undertaken some 18 months before. The Initial Order that initiated the process dated back to April 17, 2009.

[2] As a result of a Contestation filed by NCogen Power Limited ("Cogen") at the sanction hearing, this Sanction Order included the following "carve-out" wording:

> [27] **DECLARES** that <u>nothing in this Order or the *CCAA* Plan shall preclude NPower Cogen Limited ("Cogen") from bringing a motion for</u>, or this Court from granting, the relief sought in respect of the facts and issues set out in the Claims Submission of Cogen dated August 10, 2010 (the "Claim Submission"), and the Reply Submission of Cogen dated August 24, 2010, provided that such relief shall be limited to the following:
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> a) <u>a declaration that Cogen's claim against Abitibi Consolidated Inc. ("Abitibi") and its officers and directors, arising from the supply of electricity and steam to Bridgewater Paper Company Limited between November 1, 2009 and February 2, 2010 in the amount of £9,447,548 plus interest accruing at the rate of 3% *per annum* from February 2, 2010 onwards (the "Claim Amount") is (i) unaffected by the *CCAA* Plan or Sanction Order; (ii) is an Excluded Claim; or (iii) is a Secured Claim; (iv) is a D&O Claim; or (v) is a liability of Abitibi under its Guarantee;</u>
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> b) an Order directing Abitibi and its Directors and Officers to pay the Claim Amount to Cogen forthwith; or
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> c) in the alternative to (b), an order granting leave, if leave be required, to commence proceedings for the payment of the Claim Amount under s. 241 of the *CBCA* and otherwise against Abitibi and its directors and officers in respect of same.
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> (Our emphasis)

[3] This judgment deals with the Cogen Motion[3] in that regard.

[4] Briefly put, the Cogen Motion raises the following issue: do the unpaid invoices totaling £9,447,548 for energy supplied by Cogen to Bridgewater Paper Company Limited ("**BPCL**") during Abitibi's post *CCAA* filing period of November 1, 2009 to February 2, 2010, constitute a liability of Abitibi Consolidated Inc. ("**ACI**") that is unaffected by the *CCAA* Plan and outside of its scope as a result of either ACI's written unlimited guarantee, ACI's post-filing undertakings and commitments, or ACI's and BCPL's oppressive conduct ?

Reorganization and Compromise) (collectively, the "***CCAA* Plan**") is included as Schedules E and F to the Supplemental 59th Report of the Monitor dated September 21, 2010.

2 *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

3 Motion for an Order concerning the Status of the Post-Filing Supply Claim of Npower Cogen Limited and Related Relief (the "**Cogen Motion**"), dated September 24, 2010.

GENERAL CONTEXT

[5] Until February 2010, Cogen was a supplier of electricity and steam to BPCL, a United Kingdom ("UK") subsidiary of Abitibi-Consolidated Company of Canada ("**ACCC**"), itself a wholly owned subsidiary of ACI. While ACCC and ACI are two of the Abitibi Petitioners, BPCL was never included as a filing entity in the *CCAA* proceedings.

[6] Pursuant to a long-term energy supply contract dated August 3, 1998 ("**ESC**")[4], National Power PLC ("**National Power**") had agreed to build a combined heat (steam) and electrical power generation facility ("**CHP**") dedicated to BPCL's steam and power requirements, on land owned by BPCL and leased to National Power. The CHP was to be built next to BPCL's paper mill, such that BPCL would source its power requirements solely from that facility at a specified price set out in the ESC. National Power was expected to supply the mill with steam and electricity for a period of 15 years. At the end of this 15-year term, BPCL had an option to purchase the CHP for a nominal sum.

[7] As part of National Power's agreement to enter into the ESC, ACI was required to provide a written unlimited guarantee dated February 22, 1999 (the "**Guarantee**")[5]. Apparently, it was National Power's view that BPCL was not creditworthy on its own. Without the Guarantee, it would not have otherwise entered into the ESC.

[8] The Guarantee provided, amongst other things, that "*the Guarantor [ACI] hereby agrees to indemnify NP* [National Power] *against all losses, damages, costs, charges and expenses that it may suffer by reason of or in consequence of any breach by the Contractor* [BPCL] *of its obligations, commitments, warranties or undertakings under or pursuant to the Contract* [ESC]."

[9] The CHP was constructed and went into operation in 2000. The ESC and the Guarantee were assigned to Cogen on November 22, 2000, and May 26, 2005, respectively.

[10] During the course of the *CCAA* proceedings, ACI repudiated the Guarantee by letter dated July 7, 2009[6]. It did so pursuant to paragraph 46(f) of the Initial Order, which read as follows:

> [46] DECLARES that, to facilitate the orderly restructuring of their business and financial affairs (the "Restructuring"), the Petitioners and Partnerships shall have the right, subject to approval of the Monitor or further order of the Court and to:
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> [...]

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4 Exhibit R-1.
5 Exhibit R-2.
6 Exhibit R-4.

(f) repudiate such of their agreements, contracts or arrangements of any nature whatsoever, whether oral or written, as they deem appropriate, on such terms as may be agreed between the Petitioners or Partnerships and the relevant party, or failing such agreement, to make provision for the consequences thereof in the Plan and to negotiate any amended or new agreements or arrangements.

[11] Cogen objected to the repudiation by way of a letter dated August 11, 2009[7], on the basis that it did not comply with the requirements of this paragraph 46(f). Eventhough Cogen then voiced that it would contest the repudiation, no steps were taken towards that end after the sending of that letter.

[12] In November 2009, Cogen filed a proof of claim against ACI in the *CCAA* proceedings ("**Initial Proof of Claim**")[8], in accordance with the Second Claims Procedure Order of February 23, 2010. This Initial Proof of Claim was filed against ACI because of the repudiation of the Guarantee; Cogen, however, expressly reserved its rights to bring a motion for a determination of this purported repudiation.

[13] Subsequently, on February 2, 2010, BPCL entered into formal insolvency administration pursuant to the *UK Insolvency Act 1986*. At the time it did so, BPCL notably owed Cogen unpaid invoices totaling £9,447,548[9] for energy supplied under the ESC during the period November 1, 2009 to February 2, 2010, that is, during Abitibi's post *CCAA* filing period.

[14] A week later, on February 8, 2010, Cogen terminated the ESC for breach of contract on the basis of BPCL's insolvency, its non-payment of these invoices for the Abitibi post-filing period, and its entering into such administration.

[15] Thereafter, on April 6, 2010, Cogen submitted a revised proof of claim in the amount of £70,160,658 against ACI ("**Revised Proof of Claim**")[10], again as a result of the repudiation of the Guarantee and under the same reserve as the Initial Proof of Claim. The amount claimed consisted of the following sums alledgedly owed by BPCL to Cogen under the ESC:

a) Supplies of electricity and steam:	£9,447,548
b) "Take or Pay" liability:	£9,986,380
c) Transfer Charge Liability:	£49,633,937
d) Other liabilities:	£1,092,793

7 Exhibit R-5.
8 Exhibits D-2 and R-25.
9 According to Cogen, this sum is convertible to Canadian dollars at the rate of 1 UK pound for 1.8791 Cdn dollars, which corresponds to $17,752,887.
10 Exhibit R-24.

[16] On June 17, 2010, the Monitor delivered to Cogen a Notice of Revision or Disallowance of a Claim or Subsequent Claim ("**Notice of Revision**")[11]. Of Cogen's total claim of £70,160,658.13, the Notice of Revision:

(i) Allowed some $101,000,000 worth of Cogen's claims, subject to receiving evidence of the assignments of National Power to Cogen, which was subsequently provided and accepted by the Monitor as satisfactory. The amount allowed by the Monitor included the unpaid invoices of £9,447,548 as forming part of the damages arising from the repudiation of the Guarantee;

(ii) Disallowed Cogen's claim for "Take or Pay" liability in the amount of £1,223,551;

(iii) Disallowed part (£14,700,000) of Cogen's Transfer Charge claim; and

(iv) Disallowed Cogen's claim for unaffected, excluded, and/or secured status in respect of the unpaid accounts receivable totaling £9,447,548.

[17] Cogen disputed the disallowances, setting out its position and response in a Notice of Dispute delivered in July 2010 ("**Notice of Dispute**")[12]. A Claims Officer, the Honorable Joseph R. Nuss QC, heard submissions on August 26 and 27, 2010, and rendered judgment on September 28, 2010, on the allowability of certain "Take or Pay Liability" amounts and on the "Transfer Charge Deduction" dispute[13]. As a result of his ruling, the Revised Proof of Claim of Cogen against ACI was determined to stand at the total amount of $124,485,973.

[18] During the hearing on August 27, 2010, in front of the Claims Officer, ACI and Cogen agreed to refer the issue of the enhanced priority status for the unpaid accounts receivable to this Court for determination. This is the object of the Cogen Motion.

THE COGEN MOTION

[19] On one hand, Cogen contends that ACI guaranteed and committed to pay the post-filing supply of electricity and steam invoices of £9,447,548 owed by BPCL and arising after the Initial Order by reason of two (2) separate and distinct guarantees:

a) First, the ACI's Guarantee of February 22, 1999 that it submits was never effectively repudiated and thus remains in force;

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11 Exhibit R-26.

12 See the Notice of Dispute, the Initial Claims Submission, and the Reply Claims Submission, Exhibits R-27, 28 and 29.

13 Exhibit D-1.

b) Second, ACI's undertakings to pay the trade liabilities incurred by BPCL in the course of its operations and ACI's commitments to payment and support made to the Directors of BPCL. Cogen claims status to enforce these undertakings and commitments (the "**Post Filing Support Commitments**") as a third party beneficiary.

[20] On the other hand, Cogen argues that through their oppressive conduct pertaining to the manner in which it was caused, after the Initial Order, to provide energy supply services without payment while BPCL and ACI orchestrated BPCL's shutdown, ACI and its directors and officers have incurred separate direct liability towards Cogen under section 241 of the *CBCA*[14] **(the "Oppression Claim")**.

[21] Cogen asserts that these liabilities of ACI survive the *CCAA* restructuring. It pleads that, apart from compromising liabilities arising from repudiating contracts and similar such arrangements using validly exercised *CCAA* powers, the *CCAA* affords no power to compromise liability for acts committed or liabilities undertaken post-filing. In a nutshell, the relief sought here is a declaration that these liabilities of ACI to Cogen are unaffected by the *CCAA* Plan and outside of its scope.

[22] ACI opposes the claims of Cogen. In its view, the Cogen Motion seeks a superpriority payment of £9,447,548 from ACI without valid basis.

[23] First, ACI contends that Cogen has already claimed the full £9,477,548 from ACI in the *CCAA* claims process and has been awarded this amount in full by the Claims Officer as an affected unsecured claim against it. According to ACI, the Cogen Motion is, in effect, seeking a double claim for the same amount from the same party, this time on a "super-priority" basis.

[24] Second, ACI replies that the alleged survival of the Guarantee is without merit. It was repudiated with the consent of the Monitor, in full compliance with the Initial Order. Although the repudiation was objected to by Cogen in a letter sent in August 2009, it took no steps to challenge it by motion before this Court in over a year.

[25] In any event, ACI suggests that the Guarantee was the object of a claim voluntarily filed by Cogen and accepted by the Claims Officer on September 28, 2010, after a contested hearing.

[26] Third, ACI considers that the Post Filing Support Commitments claim of Cogen is an attempt to improperly appropriate for its own benefit undertakings of support given to BCPL or its Directors, and ultimately to its Administrators. In this regard, ACI asserts that Cogen's claim is entirely derivative and advanced without even an attempt at complying with the law in such matters: BPCL is in Administration and its Administrators have every capacity and interest in enforcing valid rights on their own were there any legitimacy to the alleged claims.

[14] *Canada Business Corporations Act*, R.S.C. 1985, c. C-44.

[27] For ACI, Cogen's attempt to claim the sole benefit of this alleged stipulation for another ignores, among other things, (a) the fact that the Post Filing Support Commitments were not and cannot be construed as a stipulation for the benefit of Cogen; (b) the fact that the Post Filing Support Commitments have been fully performed; and (c) the fact that Cogen is one of literally hundreds of creditors of BPCL and cannot arrogate to itself the sole right to enforce or benefit from the Post Filing Support Commitments in any event.

[28] Finally, in seeking a priority payment on the basis of an oppression remedy resting on what it alleges to be wrongful conduct on its part, ACI is of the view that Cogen ignores key facts and seeks, in reality, to bootstrap itself into the *CBCA* by virtue of the Guarantee, although virtually all of the acts complained of as instances of oppression occurred after it had been repudiated, are unrelated to any steps taken by ACI either as guarantor or as indirect shareholder of BPCL, and in fact rely almost entirely upon alleged reasonable expectations that are unjustified and upon a transaction undertaken with Monitor and Court approval, with prior notice to Cogen who then chose not to oppose it.

QUESTIONS TO RESOLVE

[29] To rule upon Cogen Motion, the Court must decide three questions:

a) Was ACI's repudiation of the Guarantee ineffective?

b) Is ACI liable to Cogen, as third party beneficiary or otherwise, to honour the Post-Filing Support Commitments?

c) Does the conduct of ACI and BPCL in causing Cogen to continue supply energy to BPCL when the latter was not able to pay for it warrant relief for Cogen under section 241 of the *CBCA*?

[30] For the reasons that follow, the Court is of the view that the answer to the three questions is no. Consequently, Cogen's claims against ACI are not excluded from and unaffected by the *CCAA* Plan and the Sanction Order of September 23, 2010. This entails the dismissal of the Cogen Motion.

ANALYSIS

1) THE GUARANTEE

[31] Cogen considers that the Guarantee remains an outstanding unrepudiated contractual obligation of ACI, which is not and cannot be compromised by the *CCAA* Plan. As a result, it asserts that the amounts owing in respect of the post filing supply of power and steam to BPCL remain liabilities of ACI under the Guarantee that are unaffected by the *CCAA* Plan.

[32] In Cogen's view, ACI's repudiation of the Guarantee was invalid in that:

a) it required the prior consent of the Monitor to be effective;

b) there must have been discussion or negotiation with Cogen prior to its sending; and

c) it must have been necessary for the orderly restructuring of its business and affairs.

[33] With respect, the Court disagrees. No serious issue can be raised regarding the appropriateness and effectiveness of the repudiation of the Guarantee.

[34] First, the Monitor consented to the repudiation before the notice was sent by ACI to Cogen on July 7, 2009. Everyone now admits this.

[35] Second, there was no requirement in the Initial Order for the agreement of the contract counterparty as a condition precedent to any repudiation. This is not what the paragragh stipulated. Cogen cannot point to any caselaw or doctrine that would support its reading of such paragraph that is, after all, standard in most *CCAA* initial orders.

[36] ACI had the authority to repudiate contracts as it deemed appropriate provided the applicable criteria were met. In such event, ACI could elect to make provision for the consequences thereof in the *CCAA* Plan. This is precisely what it indicated to Cogen in its repudiation letter of July 7, 2009.

[37] It is incorrect as well for Cogen to state that paragragh 46(f) made the right of ACI to repudiate subject to further order of the *CCAA* Court. This was simply not so. Again, no authority support Cogen's assertion in that regard.

[38] Third, the repudiation of uneconomical contracts is a key tool resorted to by insolvent companies in *CCAA* proceedings in order to restructure their affairs, return their businesses to profitability, and avoid the "social evils" associated with large-scale liquidation, the whole, for the benefit of all affected stakeholders[15].

[39] In fact, the case law on contract repudiation confirms that a debtor company under *CCAA* protection may repudiate any contract to the extent that it is economically beneficial for the restructuring to do so. A court requested to inquire into the validity of contract repudiation should respect the "business judgment rule" and avoid second-guessing the business decisions of directors and management. These principles have been asserted time and time again, including in the course of the present restructuring by Mayrand J. in the *SFK Judgment* and in the *Spliethoff Judgment*[16]:

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[15] *PCI Chemicals Canada Inc. (Re)*, 2002 CarswellQue 831 (Que. S.C.), Mayrand J., para. 52 and 58, leave to appeal denied, [2002] J.Q. No. 9988 (Que. C.A.).

[16] *AbitibiBowater Inc. (Re)*, 2009 CarswellQue 4937 (Que. S.C.), (the "***SFK Judgment***"), at para. 23-26; *AbitibiBowater inc. (Re)*, 2009 CarswellQue 14692 (Que. S.C.), (the "***Spliethoff Judgment***"), at para. 10-13.

[10] Le Tribunal réitère la norme retenue dans le jugement de *SFK Pâtes* prononcé dans le présent dossier de restructuration pour la résiliation de contrats :

> 23 Ceci étant, la norme retenue par les tribunaux permet à la débitrice de résilier un contrat dans la mesure où telle résiliation s'avère avantageuse et bénéfique pour sa réorganisation sans qu'elle n'ait à établir qu'il s'agit d'un élément essentiel à celle-ci.
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> 24 Depuis le jugement dans l'affaire *PCI* qui avalisait cette norme et l'arrêt de la Cour d'appel dans l'affaire *Mine Jeffrey*, qui en a confirmé les principes, l'état du droit est demeuré le même, sous réserve toutefois des commentaires suivants.
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> 25 Le pouvoir de répudier les contrats découle de la discrétion statutaire conférée par la LACC et non de la juridiction inhérente à laquelle avaient recours les tribunaux appelés à trancher les questions dont l'innovation n'avait pour limite que l'imagination des avocats.
>
> 26 L'exercice de cette discrétion statutaire, dont celle permettant la répudiation de contrats, est sujet à l'analyse des critères d'équité et de raisonnabilité essentielle à chaque décision prise par le juge en vertu de la LACC.

(Nos soulignés)

[11] La discrétion judiciaire doit en outre s'exercer dans le respect du « *business judgment rule* », ce qui signifie que dans l'appréciation des critères d'équité et de raisonnabilité, le Tribunal ne peut s'ingérer dans les activités commerciales de la débitrice ni substituer ses propres décisions d'affaires.

[12] Dans l'arrêt *Stelco*, la Cour d'appel de l'Ontario applique aux restructurations faites en vertu de la LACC, le principe du « *business judgment rule* » que la Cour suprême du Canada a défini dans l'arrêt People :

> 65 [...] It is well-established that judges supervising restructuring proceedings – and courts in general – will be very hesitant to second-guess the business decisions of directors and management. As the Supreme Court of Canada said in People, supra, at par. 67 :
>
> Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making ...

(Nos soulignés)

[13] Bref, la répudiation des contrats doit être bénéfique sans toutefois être essentielle à la restructuration entreprise. La discrétion judiciaire s'exerce en

> fonction des critères d'équité et de raisonnabilité, dans le respect des décisions d'affaires commerciales de la débitrice.

[40] Here, the Guarantee was in respect of a contract, the ESC, which was uneconomical for both BPCL and ACI and which ultimately was the proximate cause of the liquidation of BPCL[17].

[41] To that end, ACI underlines that pursuant to the terms of the ESC, BPCL paid Cogen total energy costs in accordance with the contract tariff, which was based on a charge for steam and electricity and a standing charge related to the costs of the construction of the CHP. Steam charges were indexed to gas market prices, while electricity and the standing charge were indexed to a basket of gas, electricity, producer price index, gas oil and heavy fuel oil market prices.

[42] For ACI, it was unusual for BPCL to have indexed both the variable costs of production of the steam and gas it purchased and the payment in respect of the fixed initial costs of construction to the price of energy. At the time, this exposure had been hedged but that protection fell away with the insolvency of Enron in late 2001.

[43] The result was that BPCL's combined energy costs (fixed plus variable costs) were significantly higher than its competitors. According to ACI, the single biggest reason for the ultimate failure of BPCL was its fundamentally uncompetitive energy contract with Cogen.

[44] No evidence adduced by Cogen suggested otherwise. The ESC has, in fact, been terminated by Cogen itself, and the principal debtor, BPCL, has been liquidated in proceedings in a foreign jurisdiction.

[45] To allege that the repudiation of potential liability arising under that – which liability was fixed by the Claims Officer at an amount in excess of $120 million – was unnecessary to the restructuring is simply without merit.

[46] Finally, apart from invoking factually inaccurate procedural arguments, Cogen does not allege any substantive reasons as to why it is entitled to challenge the repudiation of the Guarantee at this late date or at all.

[47] If anything, assuming Cogen was of the view that there was a defect in the repudiation, its remedy laid in bringing a timely application under the "come back" provisions of the Initial Order to challenge it.

[48] Cogen was well aware of this. In the August 11, 2009 letter, its counsel specifically reserved Cogen's right "*to further object to the purported repudiation and to seek to have the issue determined by the Court*". Despite this, Cogen did not challenge the repudiation before this Court until the filing of the Cogen Motion on September 24,

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17 See, notably, paragraphs 25 to 27 of the Debtors' Contestation.

2010, fourteen months after the repudiation and only once the Sanction Order had been issued.

[49] In other words, other than writing a single letter and adding its lawyer to the Abitibi Service List, Cogen took no steps to challenge the repudiation. To the contrary, in the meantime, it behaved as if the Guarantee was gone. It never raised the issue with ACI or BPCL. It never sent a letter of demand to make good upon it or to claim that it was still in force. In its Initial Proof of Claim, it merely reserved its alleged right to challenge the repudiation that it well understood had taken place.

[50] Indeed, its subsequent behaviour confirmed this understanding. Cogen would not have insisted upon the so-called Post-Filing Support Commitments it is heavily relying upon if it understood the Guarantee to still be valid and in force.

[51] In the end, Cogen chose to file a proof of claim in respect of the termination of the Guarantee, which proof of claim has now been adjudicated upon resulting in a final order of the Claim Officer[18] from which neither party has taken an appeal. Any allegation of survival of the Guarantee is hardly sustainable in that context.

[52] The Guarantee was repudiated on July 7, 2009, and the liability under it has been fully crystallized by reason of the subsequent liquidation of BPCL and the termination by Cogen of the ESC to which it relates. From that standpoint, the Guarantee itself is a pre-filing obligation that was crystallized prior to emergence. The dollar amount of the claim arising thereunder has been fixed in the claims process.

[53] Under the circumstances, the Court concludes that there is no liability of ACI under the Guarantee that would amount to an unaffected claim not subject to the *CCAA* Plan.

2) THE POST FILING SUPPORT COMMITMENTS

[54] Cogen argues that ACI incurred further obligations towards it through the Post Filing Support Commitments, which liabilities remain unaffected by the *CCAA* Plan.

[55] According to Cogen, by 2008, BPCL had become a money losing operation solely reliant on ACI for funding; ACI was, in essence, BPCL's only banker. Without assurance of its ability to pay the ongoing trade liabilities it was incurring by continuing to operate, BPCL would have been unable to continue trading under UK law and would have had to shut down.

[56] Cogen thus asserts that on the eve of its *CCAA* filing, ACI undertook to fund BPCL's liabilities by providing the financial support necessary for its continuing

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[18] Exhibit D-1.

operations[19]. An ACI's letter addressed to the Directors of BPCL on April 8, 2009, stated the following:

> "This letter serves as confirmation that [ACI] currently intends to provide adequate financial support to enable [BPCL] to meet its liabilities."

[57] After the granting of the Initial Order, Cogen states that it sought further assurances that ACI would continue to pay for post-filing supply of electricity and steam since BPCL was unable to pay from its own resources and funding for payments up to that point had come from ACI.

[58] More specifically, by letter dated April 22, 2009[20], Cogen requested a confirmation that its post-filing invoices would continue to be paid by ACI given BPCL's precarious state, failing which Cogen would exercise its entitlement to discontinue to supply energy to BPCL and seek to take such other enforcement steps as it deemed appropriate.

[59] BPCL responded[21] that it "has not entered or intends to enter into insolvency procedure" and that it would honour the then current invoice.

[60] According to Cogen, ACI's undertakings to support BPCL were thereafter reiterated in separate comfort letters issued by ACI to the Directors of BPCL on August 18, 2009[22], October 30, 2009[23], November 30, 2009[24], and January 14, 2010[25], until terminated on January 21, 2010[26].

[61] For Cogen, such support was necessary to keep BPCL in a position to pay its ongoing trade suppliers, in order to avoid wrongful trading liability under UK law. Pursuant to section 214 of the *UK Insolvency Act 1986,* liability for wrongful trading can arise if, upon an application by the liquidator to a company, the court considers that a director or former director of the company, at some time before it went into insolvent liquidation, knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation.

[62] Should a UK court determine that a director is liable for wrongful trading, that director can be required to make such contribution to the company's assets as the court thinks proper. Conduct amounting to wrongful trading can also disqualify the director from being a director of any company.

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19 Exhibit AD-7.
20 Exhibit R-8.
21 Exhibit R-9.
22 Exhibit AD-8.
23 Exhibit AD-9.
24 Exhibit AD-10.
25 Exhibit AD-11.
26 Exhibit AD-12.

[63] Cogen considers that the risks associated with wrongful trading were very real ones as far as the Directors of BPCL were concerned. Cogen maintains that the UK obligations on directors to ensure that companies do not trade when they cannot pay their suppliers are intended to protect the latter. When a support commitment is obtained, the point of the commitment is to fulfill the obligation not to prejudice the suppliers by trading without resources to pay them. Consequently, the suppliers are, by definition, the beneficiaries of that arrangement and the funding provided is specifically intended to flow to them.

[64] In addition to the above-mentionned letters, Cogen stresses that ACI and BPCL gave assurances as to BPCL's ability to continue to pay for the power and steam Cogen was supplying. To that end, both alledgedly assured Cogen, at various times after Abitibi filed for *CCAA* protection, that BPCL was not insolvent and could pay its ongoing power and steam supply bills because it had a payment support commitment issued by ACI to fund the payment of post-filing goods and services incurred.

[65] For instance, Mr. Piddington from Cogen phoned Mr. Dea from ACI in August 2009, and told him that Cogen wanted to know what was going on as Cogen had put a lot of work into the restructuring process and was nervous about BPCL's position and ability to pay for ongoing supply. Mr. Dea apparently answered that:

a) the Abitibi group management had not prioritized which mills to close, so Abitibi could not make a final decision about BPCL's proposed restructuring;

b) Cogen and BPCL management should continue working on the restructuring of BPCL;

c) Abitibi was financially supporting BPCL, and would continue to financially support BPCL no matter what was decided; and

d) whatever was decided, Abitibi would ensure, just as it planned to do in the discussions pre-*CCAA* filing, that if BPCL was shutdown, it would be a managed shutdown in which Cogen would be fully financially protected in respect of its continuing supply.

[66] Cogen also maintains that subsequently, in September 2009, BPCL's Barry Benson reaffirmed that ACI would continue to support BPCL and had issued a "comfort letter" to that effect.

[67] Cogen states that at no time was it ever advised by anyone at ACI or BPCL that the Post-Filing Support Commitments were ever capped, limited or otherwise cancelled. Cogen relied on and was induced by these representations, and as a result, continued to supply through February 2, 2010.

[68] In short, Cogen submits that:

a) The Post-Filing Support Commitments were issued by ACI to the BPCL's Directors as a result of their concern that they might, by continuing to allow BPCL to operate post filing (particularly when ACI's continuing financial support was in question), incur liability for wrongful trading under the *UK Insolvency Act 1986*;

b) The issue of the Post-Filing Support Commitments induced BPCL to continue trading until February 2, 2010, and BPCL would have had to shut down long before November 2009 had such commitments not been issued;

c) ACI directly made separate representations as to the existence and reliability of the Post-Filing Support Commitments to Cogen, with the intention of inducing Cogen to continue supplying power and steam in the belief that it would be paid in full for same by ACI in the event BPCL was shut down;

d) Cogen continued to honour its obligations under the ESC based on the Post-Filing Supply Commitments of ACI;

e) ACI failed to make good on its Post-Filing Support Commitments after garnering and enjoying the fruits of its benefits; and

f) Cogen, as third party beneficiary of the Post Filing Support Commitments, is entitled to enforce same and in particular to require ACI to pay the full amount of its unpaid supply invoices of £9,447,548.

[69] Again with respect, the Court considers unfounded the Cogen's claim based upon the Post Filing Support Commitments invoked here.

[70] On one hand, the financial assurances that were provided by ACI to BPCL's Directors were always limited in scope, quantum and time.

[71] Cogen neither sought nor did ACI give any assurances that ACI would be responsible for Cogen's accounts receivable from BPCL or any other party. To the contrary, Cogen received a very explicit disclaimer of such liability in the form of the repudiation of the Guarantee on July 7, 2009.

[72] In any event, the financial assurances provided by ACI to the Directors of BPCL have been satisfied. The evidence establishes that ACI provided substantial financial assistance to BPCL after April 17, 2009, in addition to providing a commitment of a further £2 million to the Administrators of BPCL, if needed.

[73] On the other hand, Cogen was not a party to any assurances given by ACI to BPCL or its Directors, and as unsecured creditor of BPCL in its administration proceedings, it has neither standing nor capacity to claim the benefit thereof. There is

no basis for Cogen to pursue the derivative claim in respect of the financial assurances on behalf of BPCL, its Directors or its Administrators. The claim is simply not Cogen's to bring.

[74] Interestingly, BPCL's UK Administrators have neither filed nor sought to file a claim into ACI's estate, and specifically any claims based on the financial assurances provided to the Directors of BPCL, be it on the basis of alleged wrongful trading or anything else.

[75] Cogen appears to seek to claim the sole benefit of the Post-Filing Support Commitments of ACI given to the Directors of BPCL. In seeking to rely upon the commitments as a third party beneficiary, Cogen ignores the terms of the commitments themselves and the law regarding third party beneficiaries.

[76] Both Cogen and ACI agree that the governing law on the issue of the Post Filing Support Commitments is the *Civil Code of Québec* ("***CCQ***").

[77] The Post Filing Support Commitments relied upon by Cogen are, in all cases, unilateral undertakings given by ACI to the Directors of BPCL.

[78] Under the *CCQ*, the presumption remains that only those with privity of contract or relativity of contact may sue upon a contract. The applicable principle with respect to the effects of contracts towards third parties is enunciated at Article 1440 *CCQ*, whereby the *CCQ* stipulates that a contract has effect only between the contracting parties and does not affect third persons, except where provided by law.

[79] There are limited circumstances in which this presumption can be overridden. Cogen bears the onus of persuading the Court that those circumstances exist here.

[80] With respect to the rights of third party beneficiaries such as Cogen, the *CCQ* indeed provides as follows:

> **1444.** A person may make a stipulation in a contract for the benefit of a third person.
>
> The stipulation gives the third person beneficiary the right to exact performance of the promised obligation directly from the promisor.
>
> **1445.** A third person beneficiary need not exist nor be determinate when the stipulation is made; he need only be determinable at that time and exist when the promisor is to perform the obligation for his benefit.
>
> **1446**. The stipulation may be revoked as long as the third person beneficiary has not advised the stipulator or the promisor of his will to accept it.

[81] Although the *CCQ* does provide for this possibility to stipulate for another, the Court must bear in mind that such possibility is in derogation to "relativity of contract"

principle and therefore an exception, which must be applied carefully. A party claiming to be a third party beneficiary to a contract must demonstrate that:

a) the contract to which it claims to be a beneficiary is valid and indicates a clear and unequivocal intention on behalf of the parties to the contract to create rights in favour of such third-party;

b) the party which grants rights to the third-party has an interest in doing so;

c) the third-party claiming to be a beneficiary to a contract is identifiable at the time when the rights are created pursuant to the stipulation for another; and

d) the third-party claiming to be a beneficiary has accepted the stipulation claimed to be made for its benefit.

[82] Above all, the existence of a stipulation for another depends on the clear and unequivocal intention of the contracting parties to grant rights to a third-party. The mere existence of a general advantage in favour of a third-party is not sufficient to demonstrate a stipulation for another[27].

[83] Here, as one of BPCL's hundreds of creditors, Cogen cannot claim nor demonstrate that in providing limited financial assurances to BPCL's Directors, it was ACI's clear and unequivocal intention to grant rights specifically to Cogen simply because these assurances created an advantage in its favour.

[84] There is no evidentiary basis to conclude that ACI intended nor that Cogen was entitled to be treated as a third party beneficiary to the financial assurances between ACI and BPCL's Directors. There is no evidentiary basis to conclude that a reasonable third party would have assumed the financial assurances were to have been extended in this fashion.

[85] In essence, Cogen suggests that the Post Filing Support Commitments amount to yet another guarantee of payment given to it by ACI. The interpretation urged by Cogen in regard of the Post Filing Support Commitments would indeed give it almost the same security that it knew or should have known was not there anymore following ACI's repudiation of the Guarantee.

[86] The Court cannot accept Cogen's argument under the circumstances. In law, a guarantee cannot be presumed; it is effected only if it is express (Article 2335 *CCQ*). In fact, this assertion is not sustainable when one considers that ACI precisely repudiated the unlimited written guarantee it had provided to Cogen.

[87] In all likelihood, the reason for provision of the Post-Filing Support Commitments to BPCL's Directors was not to induce Cogen to do anything. By its own admission,

[27] *Demers* v. *Dufresne engineering Co. Ltd.*, [1979] 1 R.C.S. 146, p. 148, para. 32; *Groupe Jeunesse inc.* v. *Loto-Québec*, J.E. 2004-715 (C.A.), para. 11.

Cogen was already bound to continue to supply; the evidence shows that it was benefitting to some extent in doing so by reason of the continuation of the standing charges that, under the proposed restructuring discussed between the parties but never implemented, would have been drastically reduced.

[88] Actually, according to the uncontradicted evidence of ACI, the reason for the initial letter of April 8, 2009[28] relied upon by Cogen was rather to merely comply with a request of BPCL's auditors for its year-end financial statements. It was never provided nor shown to Cogen who, indeed, was simply unaware of its existence at any relevant time.

[89] Furthermore, that letter specifically qualified the statements made therein: in terms of commitment of support, it referred to "currently", nothing else. Afterwards, the least that can be said is that such commitment was even more strongly qualified, and in fact esssentially revoked from a practical standpoint, by ACI's filing for *CCAA* protection on April 17, 2009, by ACI's repudiation of the Guarantee on July 7, 2009, and by the limited "comfort letters" it provided to BPCL's Directors from August 18, 2009 to January 14, 2010.

[90] As well, the answer given by BPCL or ACI to the other letter of Cogen of April 22, 2009[29], was anything but a firm commitment to guarantee the financial support of ACI without limitation. As appears from the April 29, 2009, response of Mr. Benson[30] and the contemporary notes of Mr. Dea[31], ACI merely agreed to pay the BPCL current invoices, with no commitment for the long-term future.

[91] In the same vein, the reason for the other "comfort letters" invoked by Cogen was simply to provide written comfort to the Directors of BPCL that ACI would continue to do what it was already doing: providing financial assistance. However, as each of these "comfort letters" indicates, that was not assistance without limit. There were limitations for both the periods and the amounts covered. The evidence indeed indicates that ACI has entirely satisfied all of these commitments given to BPCL's Directors.

[92] Contrary to what Cogen appears to imply, these comfort letters definitely did not equate to an unlimited and open-ended guarantee of ACI, similar and equivalent to the Guarantee it had repudiated shortly before. These comfort letters were, in fact, issued by ACI at the request of BPCL's Directors, and not at its own initiative.

[93] Moreover, notwithstanding its assertion to the opposite, the documentary evidence shows that Cogen was most probably well aware of the existence of the limitations of these comfort letters. Cogen's own internal notes[32] of the meeting of

28 Exhibit AD-7.
29 Exhibit R-8.
30 Exhibit R-9.
31 Exhibit AD-2.
32 Exhibit R-18.

September 25, 2009, held with Mr. Benson of BPCL referred to the continued support of ABH (sic) as being based on a "comfort letter", an expression that the writer put in quotation marks. The internal notes also emphasized that the so-called "comfort letter" had an expiry date, with an estimated level of support for the FY 2009 that was capped at a given number.

[94] Besides, the purpose and intent of these comfort letters, as explained by both ACI and BPCL representatives at hearing, was not to give some sort of guarantee of payment to BPCL's suppliers. The goal was only to reassure the Directors of BPCL, bearing in mind that under UK law, a potential liability arises solely when they have no reasonable propects of avoiding an insolvent liquidation of their company. This is, in the Court's understanding, far from being equivalent to a requirement that these Directors obtain a guarantee of payment of their suppliers before deciding to continue to operate.

[95] From that standpoint, the sole allegation of a direct representation of any sort from ACI to Cogen is alleged to have occurred on the occasion of an unsolicited call from Cogen to ACI in August 2009, after the ACI Guarantee had been repudiated. While there are factual disputes as to many elements of the call, there was certainly no request made for a specific guarantee or commitment from ACI of continuing payments for supply; and none was given according to the evidence offered.

[96] Indeed, were such an unsolicited representation to have been made, it would be strange that nobody saw fit to reduce it to writing.

[97] That is not all. Cogen's own behaviour is not consistent with the position it is now advocating with regard to these Post Filing Support Commitments.

[98] Leaving aside what the above review of the Post Filing Support Commitments relied upon by Cogen reveals, Cogen cannot point to any formal letter of demand by which it insisted upon ACI to make good on these alleged commitments given in its favor. Worse, Cogen could not provide any internal document indicating or confirming that as a result of these commitments, ACI was indeed fully supporting BPCL for the direct benefit and protection of its suppliers.

[99] In truth, the internal memorandums of Cogen circulated within its own credit risks controls department as late as in November and December 2009 make no mention whasoever of these alleged commitments in the assessment of the latter's exposure given BPCL precarious financial situation[33].

[100] As a matter of fact, Cogen rather appeared to understand that without the Guarantee, it was fully exposed: this is exaclly what it alluded to in its Initial Proof of Claim of November 2009[34]. Interestingly, Cogen made no reference to the so-called Post Filing Support Commitments in this Initial Proof of Claim.

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[33] See Exhibits PP-6 and PP-7.

[34] Exhibit D-2.

[101] After all, Cogen's representatives were knowledgeable businesspersons who understood, as far back as in April 2009, that some exposure was most likely inevitable[35]. They even mention at some point the necessity of obtaining a formal letter from a director of BPCL indicating their intention to pay future invoices and not to consume energy without an ability to pay[36]. Yet, they never insisted nor obtained such a letter or written commitment.

[102] Finally, while Cogen seeks here to make its current derivative claims effectively on behalf of BPCL's Administrators, Directors and other creditors, in an effort to secure any payments for their own behalf, in the BPCL Administration UK Proceedings commenced on February 2, 2010, Cogen's UK Claim does not seek any priority claim against BPCL. Its UK Claim is indeed silent in respect of the alleged financial assurances by the Directors of BPCL or on their alleged wrongful trading[37].

[103] Therefore, it is the Court's view that on the balance of probabilities, Cogen has not established that the Post Filing Support Commitments amount to an open-ended and unlimited guarantee of payment established by ACI in its favour or in favour of BCPL's suppliers, such that it would remain unaffected by the *CCAA* Plan.

3) THE OPPRESSION CLAIM

[104] Cogen claims it has a valid oppression remedy against ACI under section 241 *CBCA*, as the effect of the conduct of ACI, BPCL and their directors has been oppressive and unfairly prejudicial towards it.

[105] According to Cogen, the scope of the section 241 power is broad and permits the Court to make an order rectifying the matter complained of if either ACI or any of its affiliates, or their respective directors, has acted in a way that effects a result that is oppressive or unfairly prejudicial to, or unfairly disregards the interests of, a creditor.

[106] To that end, Cogen asserts that both ACI and BPCL committed acts, the effect of which was to unfairly disregard the interests of Cogen as a creditor of both entities. By July 2009, it says that ACI focussed on shedding the burden of funding BPCL, while both ACI and BPCL were interested to keep Cogen around as a supplier until its future unfolded, but they unfairly disregarded Cogen's interests by how they went about the shutdown.

[107] Under the circumstances, it is Cogen's view that the managed shutdown process was the only fair procedure, particularly given Cogen's involuntary supplier status and the incomplete information it was provided about what ACI and BPCL were really doing from July 2009 through January 2010.

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[35] See Exhibit JBE-S.
[36] See Exhibit AD-1.
[37] Exhibit JFG-2.

[108] Cogen maintains that the post-filing conduct of ACI, BPCL and their respective officers and directors that was alledgedly oppressive and unfairly prejudicial, and that has unfairly disregarded its interests, includes the following:

a) ACI's inducement of BPCL to continue to draw supply from Cogen in reliance on ACI's promise of continuing financial support, knowing that Cogen would be led to forebear from terminating the ESC and to continue supplying BPCL into 2010;

b) ACI's inducement of BPCL to represent to Cogen that all continuing supply of electricity and steam post filing would be paid in full with the assistance of ACI's financial support;

c) ACI's and BPCL's inducement of Cogen to continue to supply electricity and steam to BPCL following Abitibi's *CCAA* filing by representing that supplies would be paid in full as a result of the Post-Filing Support Commitments and notwithstanding ACI's purported repudiation of the Guarantee;

d) ACI's and BPCL's conducting bad faith restructuring negotiations of their contractual arrangements with Cogen throughout 2009, which were not in fact intended to be concluded by ACI and BPCL with Cogen, but were rather aimed at inducing Cogen to forebear from terminating the ESC in 2009 before ACI was ready to cause BPCL to shut down;

e) The invalid and improper attempt to repudiate the Guarantee;

f) The advice to Cogen that BPCL would not be shutdown in 2009 or 2010;

g) ACI's and BPCL's failure to disclose their plans formulated in 2009 to shut down BPCL;

h) BPCL's representation to Cogen in October 2009, with ACI's knowledge and acquiescence, that the stripping of assets from BPCL would not result in BPCL ceasing business, when in fact it was part of a scheme to shut down BPCL;

i) The stripping of assets from BPCL without full disclosure to the Court of the impending shutdown of BPCL or the lack of any true consideration therefor;

j) Leaving BPCL without any realistic ability to pay for any services or goods acquired post-assets strip yet continuing to allow it to draw services from Cogen;

k) The refusal of ACI to honour Post-Filing Support Commitments as soon as it had stripped the assets out of BPCL; and

l) The lack of any notice to Cogen after ACI decided it would not continue to support BPCL.

[109] As creditor of ACI and BPCL, Cogen submits it had the reasonable expectation that ACI, BPCL and their respective directors and officers would not act in a manner oppressive or unfairly prejudicial to their creditors. In that regard, Cogen asserts more particularly that it rightfully had the following expectations:

a) Cogen had a reasonable expectation that BPCL would be kept operating by ACI while ACI was seeking lender support for the restructuring of the ESC;

b) Cogen had a reasonable expectation that it would be informed if ACI or BPCL had decided not to proceed with the ESC restructure, and that a managed shutdown would ensue;

c) Cogen, as an involuntary supplier which had engaged cooperatively in managed shutdown negotiations with ACI in 2008 and then in the ESC restructuring negotiations with BPCL and ACI in 2009, had a reasonable expectation that it would be informed by each of ACI and BPCL (a) of the strategy to liquidate BPCL in lieu of restructuring it that ACI and BPCL developed and implemented from July through October 2009, and (ii) of the undisclosed limits on the financial support being provided to BPCL from and after August 18, 2009;

d) Cogen had a reasonable expectation that any limits imposed on the Post-Filing Support Commitments would be above any amount sufficient to fully fund the obligations to Cogen (otherwise BPCL would have been insolvent and should have ceased trading);

e) Cogen had a reasonable expectation that ACI or BPCL would not induce Cogen to continue supplying in reliance on a pattern of conduct and representations of ACI's support that suggested BPCL was not insolvent;

f) Cogen, as an involuntary supplier, had a reasonable expectation that BPCL would cease drawing energy supplies once it had no reasonable expectation of being able to pay for them (i.e. if its financial resources were withdrawn or limited by ACI to a level below which it was sufficiently certain that Cogen would be paid, or if its insolvency was imminent) and so inform Cogen;

g) Cogen had a reasonable expectation that BPCL and its Directors would comply with the *UK Insolvency Act 1986* and that they would not engage in wrongful trading, and that ACI would not facilitate that;

h) Cogen had a reasonable expectation that ACI, as the sole source of financial support for BPCL, would either provide the necessary financial support to fund BPCL's operations, or inform Cogen of its intention to cease providing that support so that Cogen could immediately terminate supply; and

i) Cogen had a reasonable expectation that (a) ACI would not curtail its financial support and then allow BPCL to extend its operational life (until ACI was ready to trigger its liquidation) by "cherry picking" payables to pay– i.e. selectively choose who to pay and who to draw supply from without paying, and that (b) BPCL would cease trading once it no longer had a sufficient commitment of enough financial support from ACI necessary to pay Cogen for continuing supply.

[110] Still with respect to the arguments put forward by Cogen, the Court considers that the Oppression Claim must be discarded. The reasonable expectations relied upon by Cogen are not supported by the evidence and the oppressive conduct attributed to ACI or BPCL is not established either.

[111] Pursuant to the Supreme Court of Canada decision in *BCE v. 1976 Debentureholders*[38], the test which Cogen must satisfy in respect of oppression remedy is two fold:

a) Does the evidence support the reasonable expectations asserted by Cogen; and

b) Does the evidence establish that the reasonable expectations were violated by conduct falling within the terms "oppression", "unfair prejudice" or "unfair disregard" of a relevant interest?

[112] In *BCE*, the Supreme Court looked at the two approaches Canadian courts have taken with respect to oppression and stated that combining these lines of inquiry is the preferred analysis[39]. The first branch of the test examines reasonable expectations as being the rationale underlying the oppression remedy. If such a breach is found, the Court will then look to see whether the breach was oppressive, unfairly prejudicial or a consequence of unfairly disregarding of the complainant's interests.

[113] To determine a claimant's reasonable expectations, the Supreme Court in *BCE* examined the following five factors[40]:

a) Commercial practice – what are the parties' normal business practices;

b) Relationships – personal relationships between the corporation and the claimants may colour the parties' expectations;

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[38] *BCE v. 1976 Debentureholders*, [2008] 3 S.C.R. 560, at para. 68.
[39] *Id.*, at para. 54-56.
[40] *Id.*, at para. 73-81.

c) Preventive steps – could the claimant have taken steps to protect itself from the allegedly oppressive conduct;

d) Representations and agreements – the content of representations and agreements may inform the Court of the parties' reasonable expectations; and

e) Fair resolution of conflicting interests – the Court should keep in mind that the corporation must consider the interests of all stakeholders, not just the claimant.

[114] In the Court's opinion, Cogen fails to satisfy the tests established by the Supreme Court for relief under the oppression remedy.

[115] Under the rubric of "oppression", Cogen seeks to claim an award of damages not from the corporation with which it did business (i.e. BPCL), but its indirect parent (ACI) based on matters in no way made the subject of undertakings either in the ESC or the Guarantee. In so doing, the alleged "oppression" claim primarily duplicates matters that Cogen unsuccessfully raised elsewhere, namely on the basis of:

a) the alleged wrongful repudiation of the Guarantee by ACI; and

b) the alleged Post Filing Support Commitments given by ACI.

[116] As it happens, the gist of the reasonable expectations asserted by Cogen revolves around two main contentions. First, the alleged commitment of unlimited and open-ended financial support of ACI to BPCL and ACI's alleged undertaking to pay all BPCL's invoices as they become due. Second, the alleged promise made post-filing by both ACI and BPCL that no matter what, at worst, a managed shutdown of BPCL would ensue.

[117] With respect, on the balance of probabilities, the evidence does not support either one of these assertions.

[118] On one hand, the alleged commitment of unlimited and open-ended financial support of ACI and ACI's alleged undertaking to pay all BPCL's invoices as they become due are based essentially upon the Guarantee and the Post Filing Support Commitments. As analysed thoroughly before, the Court is of the view that Cogen's position on either one is unfounded.

[119] To the contrary, these alleged commitment and undertaking are notably countered by:

a) the clear and unequivocal repudiation of the Guarantee[41];

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[41] Exhibit R-4.

b) the negative answer given by both ACI and BPCL, as early as April 2009, to Cogen's request for a long-term commitment of financial support[42];

c) the monetary and time limits of the support or comfort letters given by ACI to the Directors of BPCL[43], and Cogen's likely knowledge of these limits[44];

d) the recognition by Cogen itself of its exposure to BPCL precarious financial situation in April 2009 and in November 2009[45]; and

e) the absence of reference to such commitment and undertaking in any internal documentation of Cogen at any relevant time[46], as well as in any formal letter of demand or even in the Cogen Initial Proof of Claim[47].

[120] Similarly, Cogen's assertion that ACI had to commit to such support to avoid a wrongful trading liability of BPCL's Directors under UK law cannot amount, in the Court's opinion, to a reasonable and justified expectation on its part. To so conclude, the Court would have to consider this potential wrongful trading liability under UK law as requiring the Directors of BPCL to obtain a full guarantee of suppliers' payment from its parent company. This is not what the relevant section of the *U.K. Insolvency Act 1986* states. The Affidavit of Mr. Valentin on this issue certainly does not go that far either.

[121] On the other hand, the alleged promise made by ACI of a managed shutdown of BPCL is, this time, refuted by:

a) the clear representation of ACI that, following the Initial Order, any pre-filing negociations were off the table and put aside[48];

b) the evidence of Mr. Dea concerning the August 2009 meeting whereby he categorically denied having made any such promise to Mr. Piddington; and

c) the absence, again, of any reference to such promise of a managed shutdown in any internal documentation of Cogen at any relevant time, in any formal letter of demand or in the Initial Proof of Claim[49].

[122] Bearing these general observations in mind, an analysis of each of the factors identified by the Supreme Court demonstrate that the oppression remedy is inapplicable in the circumstances.

[123] The Commercial Practice factor does not justify the creation of a guarantee by way of disputed oral communications when the entire thrust of the law is to require such

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42 See Exhibit R-9 in answer to Exhibit R-8.
43 See Exhibits AD-7 to AD-12.
44 See Exhibits R-18, PP-6 and AD-4.
45 Exhibits JEB-S and AD-2.
46 Exhibits PP-6 and PP-7.
47 Exhibit D-2.
48 See Exhibits AD-2 and JBE-T.
49 Exhibits PP-6, PP-7 and D-2.

obligations to be in writing. Cogen knew what guarantees looked like and can hardly have had a reasonable expectation that an insolvent *CCAA* debtor would provide treatment to a trade creditor of one of its affiliates on terms more favourable than it provided to its own creditors. This is all the more true where there was a previously existing guarantee that had been repudiated in writing by ACI.

[124] To suggest that the parties somehow revived the Guarantee so soon after its repudiation without written confirmation is improbable and inconsistent with the subsequent conduct of Cogen, to say nothing of commercial practice in matters of guarantees.

[125] Turning to the Relationships factor, there was nothing in the parties' relationships that suggests a reasonable expectation could arise. ACI was in *CCAA* proceedings and had no special power over BPCL or Cogen. To the contrary, ACI made clear that any prior negotiations were now "off the table" by virtue of the *CCAA* filing[50], repudiated the Guarantee, and otherwise insisted that it was for BPCL management and Cogen to negotiate a restructuring of the ESC that would make BPCL viable, in a context where the time for doing so was limited as was ACI's willingness to make financial assistance available.

[126] As for the Preventive Steps third factor, it remains that the credit terms embedded within the ESC made it inevitable that some amount of trade payables to Cogen, accrued or due, would be outstanding regardless of when a decision to cease operations and wind down was taken by BPCL. Cogen's November 2009 Initial Proof of Claim recognized this as it included a claim for £5.3 million in estimated payables at a time when BPCL was still operating (but Cogen considered its cessation of operations a certainty)[51].

[127] The allegation that Cogen was an involuntary supplier is unsupported. Cogen was a supplier because it had a binding contract to do so on credit terms which it negotiated until default by BPCL, and neither ACI's insolvency nor the repudiation of the Guarantee was a default. This was Cogen's contract and the evidence shows that it benefitted with over £10 million in fixed charge rent received in the period following ACI's *CCAA* proceedings.

[128] Conversely, from BPCL's perspective, the evidence is that BPCL did take some reasonable preventive steps to mitigate the impact of its precarious financial situation on Cogen by (i) paying what it could when it could; (ii) curtailing the hedging activity it was entitled to require Cogen to enter into (at some cost to its operations); and (iii) attempting a going-concern restructuring. ACI in turn provided significant financial support to enable BPCL to do so.

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[50] See Exhibits AD-2 and JBE-T.
[51] Exhibit D-2.

[129] The fourth factor focuses on the Fair Resolution of Conflicting Interests. This is perhaps the most glaring reason why Cogen's attempt to invoke the Court's equitable jurisdiction through the oppression remedy must fail.

[130] Overall, Cogen has been treated vastly better than trade creditors of ACI by virtue of the fact that it was dealing with a non-filing entity, BPCL. Unlike ACI's trade creditors, it received payment in full of pre-filing amounts. The other significant advantage it received was that ACI, post April 17, 2009, made financial assistance available to BPCL which was used by BPCL to continue to pay over £10 million in fixed charges for the use of the CHP owned by Cogen. These charges, which accrued by virtue of the passage of time rather than in function of the amount of electricity or steam consumed, were described by Cogen as effectively rent for the exclusive use of the CHP. Cogen benefitted from the continuation of BPCL's operations at the expense of ACI's creditors who derived little to no benefit beyond an attempted soft landing.

[131] ACI had duties to stakeholders beyond Cogen and was in insolvent circumstances. It would be unfair and inequitable to give Cogen a preferential treatment. Cogen cannot justify "reasonable expectations" that they should have such preferential treatment within the meaning of the *BCE* tests.

[132] The last factor identified by the Supreme Court is Representations and Agreements. In order to be actionable, a misrepresentation must be as to an existing state of fact; subject to narrow exceptions, statements of future facts are generally not misrepresentations. Cogen would have to prove that a statement of future fact imports a misstatement of an existing fact to create the basis for a negligent misrepresentation[52].

[133] Cogen has failed to allege any specific fact that was represented by ACI which was untrue when made. The only direct representation alleged to have been made by ACI to Cogen was in the circumstances of the call initiated by Cogen in August, 2009.

[134] Mr. Dea has denied the evidence provided by Cogen regarding this alleged discussion. According to Mr. Dea, Mr. Piddington made a cold call to him in August 2009; he does "not recall Mr. Piddington expressing concern about being paid for on-going supply" during this call and noted that "the idea that ACI would have agreed to pay or guarantee Cogen's post-filing supply of electricity in an unsolicited phone call shortly after having expressly terminated ACI's existing guarantee under the *CCAA* is false".

[135] It should be noted that at that juncture, Cogen and BPCL had an agreement in principle as to a restructuring of the ESC, which would have vastly reduced the monthly fixed charges. At the time, BPCL had hoped to have the new cost structure in place by November 2009, but Cogen would not agree to implement it unless the transfers of land which were contemplated could also be completed as well. This latter step required the

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52 *Guertin* v. *Enterprises JJP Inc.*, J.E. 98-887 (C.A.), p. 7.

support of ACI's secured lenders, especially the Senior Secured Notes, who were then in discussions regarding the MPCo Sale process.

[136] As well, the discussion was at a time when BPCL's business was doing comparatively better than it had, and certainly before losses at BPCL began to accelerate in November and especially December 2009. Furthermore, ACI was then in the midst of its own restructuring, had limited availability of funds, and was attempting to put the building blocks of its own restructuring plan in place. Finally, ACI had just terminated the Guarantee in July 2009.

[137] Similarly, Mr. Dea also denied the evidence offered by Mr. Piddington to the effect that he would have represented that, no matter what, a managed shutdown of BPCL would ensue at worst. Mr. Dea's contemporary notes[53] make no mention of that and no formal confirmation of this alleged commitment ever followed. Moreover, such an alleged commitment would have been contrary to what had been clearly stated barely four months before, namely that all pre-*CCAA* filing discussions were now off the table.

[138] Faced with these denials and given the circumstances surrounding the call, the Court cannot conclude that Cogen has met its burden of proving that the representation it alledgedly relied upon was indeed made as suggested.

[139] Even if one was to concede that there is dispute as to what was exactly said, it remains that there is no evidence that anything was said that meets the standard for a claim of misrepresentation of a future fact. In addition, given that Cogen was not then in a position to terminate the ESC, it cannot in any event demonstrate detrimental reliance.

[140] In that context, the representations allegedly made to Cogen fall far short of supporting oppression or any other type of claim. In this respect, it must be highlighted again that the evidence rather indicates that:

a) Immediately following ACI's *CCAA* filing, Cogen sought confirmation from BPCL and ACI that its invoices would be paid. On April 29, 2009, BPCL only committed to pay the April invoice[54]; this was not an open ended commitment as Cogen suggests;

b) Shortly after Abitibi's *CCAA* proceedings, BPCL's management entered into discussions with Cogen, advising that no decision had been made regarding BPCL's future, that BPCL and ACI could not commit at that point for the long term future, and that previous restructuring efforts were off the table given ACI's dramatically changed circumstances[55];

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[53] Exhibit AD-13.
[54] Exhibit R-9.
[55] Exhibits AD-2 and JBE-T.

c) While financial assurances were made by ACI to Directors of BPCL for purposes of providing comfort during the months following the Abitibi *CCAA* filing, the financial assurances were made to BPCL Directors only and were limited in time and amount[56]. Cogen was made aware that these financial assurances had been provided by ACI only to the Directors of BPCL, and were limited in time and amount. Still, it sought but was not provided details of such financial assurances provided by ACI to BPCL's Directors. Nevertheless, Cogen continued to supply under the ESC; and

d) Cogen neither sought nor did ACI give any assurances that ACI would be responsible for Cogen's accounts receivable from BPCL or any other party. To the contrary, Cogen received an explicit disclaimer of such liability in the form of the repudiation of the Guarantee on July 7, 2009.

[141] In summary, contrary to the alleged reasonable expectations relied upon by Cogen, the evidence suggests that on the whole:

a) Cogen understood that ACI was itself insolvent as a result of its *CCAA* filing and had only limited means to support BPCL. More particularly, Cogen knew of ACI's *CCAA* filing at or about the time it occurred on April 17, 2009, and of the financial constraints on BPCL as a result. As soon as April 22, 2009, Cogen wrote to BPCL indicating that it was aware that "ACI may no longer provide funds for the payment of our invoices"[57];

b) Cogen was aware that a restructuring of the ESC was the only way in which BPCL had a chance at viability and that pre *CCAA* discussions were off the table[58];

c) Cogen continued to insist on deferring a restructuring of the ESC until the completion of ACI's restructuring despite knowing that a failed restructuring of the ESC could well be the "straw that breaks the camels back" given the massively uneconomic terms of the ESC and the significant drain on scarce cash that was required to maintain it in good standing[59];

d) Cogen knew the cash situation of BPCL deteriorated significantly in late 2009 and that BPCL was approaching its secured creditors in January 2010 to seek support for a restructuring; and

e) Cogen was aware that ACI had specifically repudiated its obligations to Cogen under the Guarantee and that ACI had advised BPCL that future financial support was on a month-to-month basis.

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56 Exhibits AD-7, AD-8, AD-9, AD-10, AD-11 and AD-12.
57 Exhibits R-7 and R-8.
58 Exhibits AD-2 and JBE-T. See also, Exhibit JFG-3.
59 Exhibit R-18.

[142] As emphasized before, this likely explains why Cogen noted, in its Initial Proof of Claim of November 2009, that:

> "(...) the probability of Cogen needing to call on the Guarantee is very high to 100%. BPCL's tenuous financial position is recognized by Abitibi itself throughout its motion materials filed in support of its Motion for Authorization to enter into Transactions for the Restructuring of the Petitioners' European Sale Structure. (...)"

[143] In the same fashion, in December 2009, Cogen's President acknowledged he was aware ACI's financial support was on a monthly basis only and that "BPCL still expect a restructure but our expectation is that Abitibi will announce closure of BPCL in Q1 2010". He added further that "current short term net credit exposure has reduced" and that "plan remains to try and secure the unit as a STOR [i.e. peaking] facility in the event of closure"[60].

[144] As such, in the fall of 2009, Cogen was preparing its own contingency plan for an insolvency of BPCL, including a strategy to acquire the land and convert its operation to a "peaking plant", selling its power output at a premium price to the grid instead of to a sole customer at a fixed price. This was hardly consistent with the alleged assurance of being kept fully protected by ACI as alleged.

[145] Actually, it is interesting to note that while Cogen filed a claim into BPCL's UK administration proceedings, it did not allege any wrongful trading, misrepresentation or oppression claims therein[61].

[146] That said, the additional assertions of Cogen of the alleged oppressive conduct of ACI in what it refers to as being the stripping of assets from BPCL or as the ACI and BPCL decision to proceed to the liquidation of BPCL as early as in the fall of 2009 are no more supported by convincing evidence that would justify an oppression remedy under the circumstances.

[147] The attempt to include an allegation relating to "stripping" of assets from BPCL as a further instance of oppressive conduct is without merit. BPCL, who is in Administration and has its own representatives, has made no such complaint. The transaction in question – involving the transfer of assets subject to the security of the Term Lenders – was approved by the Court on November 10, 2009, on notice to the Service List, including Cogen.

[148] This transaction for the restructuring of Abitibi's European sale structure had the effect of ensuring that all of Abitibi's post-filing sales and the resulting receivables were in the hands of entities under the Court's control. This transaction was financially neutral to BPCL whose inventory and receivables were already fully charged to the Term Lenders.

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[60] See Exhibit PP-7.
[61] Exhibit JFG-12.

[149] In the same manner, Cogen's allegation that both BPCL and ACI knew, after September 2009, that BPCL would go into insolvent liquidation is contrary to the direct evidence presented at hearing in this respect.

[150] At hearing, Mr. Guillot explained that any contingency planning considered by BPCL in the fall 2009 did not involve BPCL going necessarily into insolvent liquidation. The goal, as he put it, had always been for BPCL to survive, not to be liquidated. The administration proceeding was one of the process considered to that end. Even there, the hope was to continue operations of BPCL as a going concern.

[151] To that end, Cogen appears to equate administration proceedings to an insolvent liquidation. As explained at hearing by Mr. Guillot, this is not inescapably the case and this was definitely not the approach then favored by BPCL. Indeed, as late as in December 2009, Cogen's own President acknowledged that BPCL expected to restructure. It is Cogen who, at that time, had rather the expectation that BPCL would close in early 2010[62].

[152] In that regard, the reports of Ernst & Young UK[63] in fact confirmed that in the fall 2009, many options were still being contemplated as part of the contingency planning of BPCL. One could not conclude that the insolvent liquidation of BPCL was, at that time, the only potential or reasonable outcome, to the contrary.

[153] All things considered, the Oppression Claim advanced by Cogen in support of the *CCAA* unaffected claim status of its unpaid energy supply invoices must fail.

[154] Insolvency courts should be cautious in permitting collection or debt matters to be reframed as oppression actions. As noted by Farley J. in the context of a receivership matter, "(i)t does not seem to me that debt actions should be routinely turned into oppression actions"[64].

[155] As the Ontario Court of Appeal recently stated in *J.S.M. Corp. (Ontario) Ltd.* v. *Brick Furniture Warehouse Ltd.*[65]:

> 62 The reasonable expectations of parties to commercial agreements negotiated at arms length must be those reasonable expectations that find expression in the agreements negotiated by the parties. (…)

[156] In that case, the Ontario Court of Appeal emphasized that a bad bargain cannot alter a party's reasonable expectations or render a breach of an agreement oppressive conduct. As well, it emphasized that a party could not argue that it reasonably expected to have rights it had not negotiated in a commercial agreement.

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62 Exhibit PP-7.
63 See amongst others Exhibit R-10.
64 *Royal Trust Corp. of Canada v. Hordo*, [1993] O.J. No. 1560 (Ont. Gen. Div.), at para. 12.
65 2008 ONCA 183.

[157] Finally, the Ontario Court of Appeal warned that the oppression remedy should not be a mean by which commercial agreement negotiated at arms length by sophisticated party can be rewritten to accord with a court's after the fact assessment of what would have been just and equitable under the circumstances. It even added that:

> 66 (...) The position of a creditor who can, but does not, protect itself against an eventuality from which he later seeks relief under the oppression remedy, is much different than the position of a creditor who finds his interest as a creditor compromised by unlawful and internal corporate manoeuvres against which the creditor cannot effectively protect itself. In the latter case, there is much more room for relief under the oppression provisions than in the former case. (...)

[158] In the Court's opinion, these principles apply in the current situation.

4) THE COSTS ISSUE

[159] In closing, a few words on the costs issue are necessary.

[160] The granting of court costs is a matter of judicial discretion. In the Court's view, this is not a case where court costs should be awarded in favor of any party.

[161] At the beginning of the hearing, the Court specifically invited Counsel to make representations and address the costs issue in their oral submissions. Neither one did, despite being well aware of the reasons for such an invitation.

[162] As noted by the Court more than once, on this motion, Counsel have, unfortunately, paid scant respect to the Court's requests in terms of case management and case preparation, the whole, notwithstanding the fact that the Court made efforts to rearrange its agenda to accomodate the parties.

[163] As a result of Counsel failing to abide by their commitments and representations to the Court, one hearing day was lost and additional hearing dates had to be scheduled, to the detriment of the Court's administration as well as others.

[164] This was unacceptable and suffices for the Court to conclude that each party should bear their own costs on the dismissal of the Cogen Motion.

FOR THESE REASONS, THE COURT:

[165] **DISMISSES** the Cogen Motion;

[166] **WITHOUT COSTS.**

CLÉMENT GASCON, J.S.C. J.S.C.

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Attorneys for NPower Cogen

Dates of hearing: November 16, 17, 18 and 30, and December 1, 2010

SCHEDULE "A"
ABITIBI PETITIONERS

1. ABITIBI-CONSOLIDATED INC.
2. ABITIBI-CONSOLIDATED COMPANY OF CANADA
3. 3224112 NOVA SCOTIA LIMITED
4. MARKETING DONOHUE INC.
5. ABITIBI-CONSOLIDATED CANADIAN OFFICE PRODUCTS HOLDINGS INC.
6. 3834328 CANADA INC.
7. 6169678 CANADA INC.
8. 4042140 CANADA INC.
9. DONOHUE RECYCLING INC.
10. 1508756 ONTARIO INC.
11. 3217925 NOVA SCOTIA COMPANY
12. LA TUQUE FOREST PRODUCTS INC.
13. ABITIBI-CONSOLIDATED NOVA SCOTIA INCORPORATED
14. SAGUENAY FOREST PRODUCTS INC.
15. TERRA NOVA EXPLORATIONS LTD.
16. THE JONQUIERE PULP COMPANY
17. THE INTERNATIONAL BRIDGE AND TERMINAL COMPANY
18. SCRAMBLE MINING LTD.
19. 9150-3383 QUÉBEC INC.
20. ABITIBI-CONSOLIDATED (U.K.) INC.

SCHEDULE "B"
BOWATER PETITIONERS

1. BOWATER CANADIAN HOLDINGS INC.
2. BOWATER CANADA FINANCE CORPORATION
3. BOWATER CANADIAN LIMITED
4. 3231378 NOVA SCOTIA COMPANY
5. ABITIBIBOWATER CANADA INC.
6. BOWATER CANADA TREASURY CORPORATION
7. BOWATER CANADIAN FOREST PRODUCTS INC.
8. BOWATER SHELBURNE CORPORATION
9. BOWATER LAHAVE CORPORATION
10. ST-MAURICE RIVER DRIVE COMPANY LIMITED
11. BOWATER TREATED WOOD INC.
12. CANEXEL HARDBOARD INC.
13. 9068-9050 QUÉBEC INC.
14. ALLIANCE FOREST PRODUCTS (2001) INC.
15. BOWATER BELLEDUNE SAWMILL INC.
16. BOWATER MARITIMES INC.
17. BOWATER MITIS INC.
18. BOWATER GUÉRETTE INC.
19. BOWATER COUTURIER INC.

SCHEDULE "C"
18.6 CCAA PETITIONERS

1. **ABITIBIBOWATER INC.**
2. **ABITIBIBOWATER US HOLDING 1 CORP.**
3. **BOWATER VENTURES INC.**
4. **BOWATER INCORPORATED**
5. **BOWATER NUWAY INC.**
6. **BOWATER NUWAY MID-STATES INC.**
7. **CATAWBA PROPERTY HOLDINGS LLC**
8. **BOWATER FINANCE COMPANY INC.**
9. **BOWATER SOUTH AMERICAN HOLDINGS INCORPORATED**
10. **BOWATER AMERICA INC.**
11. **LAKE SUPERIOR FOREST PRODUCTS INC.**
12. **BOWATER NEWSPRINT SOUTH LLC**
13. **BOWATER NEWSPRINT SOUTH OPERATIONS LLC**
14. **BOWATER FINANCE II, LLC**
15. **BOWATER ALABAMA LLC**
16. **COOSA PINES GOLF CLUB HOLDINGS LLC**